

# NOT PEACE, BUT A SWORD: NAVY V. EGAN AND THE CASE AGAINST JUDICIAL ABDICATION IN FOREIGN AFFAIRS

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## ABSTRACT

*In the United States' system of separation of powers, the judiciary must safeguard the rights of individuals from abuses by the political branches of government. Yet, when it comes to matters touching foreign affairs, scholars such as John Yoo and jurists such as Antonin Scalia argue that the executive branch is entitled to virtually unreviewable discretion. They point to Navy v. Egan for support. There, the Court held that an administrative body that hears appeals from adverse actions against government employees was precluded from reviewing the merits of security clearance determinations because the executive branch deserves "super-strong" deference in foreign affairs. An examination of the disastrous consequences of Egan crystallizes the constitutional and functional arguments against "super-strong" deference to the executive—both in foreign affairs generally and in the security clearance process specifically.*

*The case has prompted lower courts to deny plaintiffs an independent forum in which to bring constitutional claims related to security clearance denials and revocations. Egan's progeny flouts the longstanding principle that an individual who suffers a constitutional injury is entitled to an appropriate remedy. Furthermore, by abdicating its duty to check executive power in the security clearance context, the judiciary has fortified deficiencies inherent to executive agency decisionmaking, namely tunnel vision, path dependency, and*

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*imperialist tendencies. Abdication has also enabled a systematic denial of clearances to candidates with foreign connections. Without a diverse counterterrorism workforce, the United States lacks the operational proficiency and the legitimacy to wage a successful war on terrorism.*

*This Note is the first to call on the judiciary to reclaim the right to exercise judicial review of the merits of security clearance determinations. Furthermore, it charts a path for lower courts to reopen judicial review of the merits of security clearance determinations, provide injured plaintiffs with a remedy, deter future racial discrimination, and avert a chilling effect on agency decisionmakers.*

## INTRODUCTION

Tucked inside Justice Antonin Scalia's scathing dissent in the landmark case of *Boumediene v. Bush*<sup>1</sup> lies a passing reference<sup>2</sup> to *Department of the Navy v. Egan*.<sup>3</sup> *Egan* holds a special place in the string citations and law review footnotes of conservative jurists because it fortified the constitutional and functional pillars propping up the executive branch's purported entitlement to "super-strong" deference in foreign affairs.<sup>4</sup> In *Egan*, the Court held that the Merit Systems Protection Board, an administrative body created to hear appeals from adverse actions against government employees, was precluded from reviewing the substance of security clearance determinations in the absence of express congressional authorization because the executive branch deserves the "utmost deference" in conducting foreign affairs.<sup>5</sup> Constitutionally, this executive entitlement allegedly derives from the president's status as commander-in-chief.<sup>6</sup> Functionally, the executive branch is said to have structural advantages that make it uniquely

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1. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

2. *Id.* at 2297 (Scalia, J., dissenting) ("Indeed, we accord great deference even when the President acts alone in this area. See *Department of Navy v. Egan*, 484 U.S. 518, 529–30 (1988); *Regan v. Wald*, 468 U.S. 222, 243 (1984).").

3. *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988).

4. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100–01 (2008) (describing "super-strong" deference in foreign affairs as the strongest form of deference courts can invoke).

5. *Egan*, 484 U.S. at 529–30 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

6. *Id.* at 527.

competent to address problems related to foreign affairs.<sup>7</sup> This Note will demonstrate how, ironically, the destructive consequences of *Egan* itself demonstrate that the edifice supporting super-strong deference to executive power rests on defective foundations.

When the government issues a security clearance, it has determined that an individual is fit to access classified information.<sup>8</sup> The best estimates suggest that at least 2.5 million positions across executive agencies require security clearances.<sup>9</sup> To obtain a security clearance, candidates must complete a three-stage process: application, investigation, and adjudication.<sup>10</sup> There have been longstanding criticisms about the efficiency and quality of the process. In a recent report on the topic, the House of Representatives Intelligence Committee summarized these criticisms.<sup>11</sup> It found that the process continues to be plagued by Cold War attitudes and technology; lengthy delays and substantial backlogs; discrepancies in approach among agencies and the absence of quality metrics; and an unhealthy focus on applicants' foreign family members and associates, which has weeded out many applicants with Middle Eastern backgrounds, language skills, and expertise.<sup>12</sup> Recent statutes and executive orders have remedied some of these problems, but overall the process continues to be stuck in "layers and layers of planning."<sup>13</sup> The stunningly sparse legal scholarship on judicial review of security clearance determinations consists of two student works, one calling for the legislative branch to authorize limited judicial review<sup>14</sup> and one calling on the executive branch to do the same.<sup>15</sup> This Note is the first to call on the judiciary to reclaim, on its own, the right to exercise judicial review of the merits of security clearance

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7. *Id.* at 529; Julian Ku & John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 201–02 (2006) (noting that executive agencies "possess greater expertise over a complex and technical statute.").

8. Exec. Order No. 12,968, 3 C.F.R. 391 (1995), reprinted in 50 U.S.C. § 435 (2006).

9. SILVESTRE REYES, PERMANENT SELECT COMM. ON INTELLIGENCE, SECURITY CLEARANCE REFORM—UPGRADING THE GATEWAY TO THE NATIONAL SECURITY COMMUNITY, H.R. REP. NO. 110-916, at 4 (2008).

10. *Id.* at 5.

11. *Id. passim.*

12. *Id.* at 7–10.

13. *Id.* at 20.

14. David C. Mayer, Note, *Reviewing National Security Clearance Decisions: The Clash Between Title VII and Bivens Claims*, 85 CORNELL L. REV. 786, 813 (2000).

15. William H. Miller, Note, *A Position of Trust: Security Clearance Decisions After September 11, 2001*, 14 GEO. MASON U. CIV. RTS. L.J. 229, 253 (2004).

determinations and thus provide a necessary check on executive power in the security clearance process. Contrary to the thinking of jurists like Justice Scalia<sup>16</sup> and scholars like John Yoo,<sup>17</sup> this Note will argue that constitutional and functional considerations weigh heavily against super-strong deference to the executive—both in foreign affairs generally and in the security clearance process specifically. To properly critique the drawbacks of super-strong deference and the benefits of judicial review, this Note will address in depth the problem of racial and national origin discrimination in the security clearance process.

Part I of this Note lays out the nuts and bolts of the security clearance process. Part II addresses the constitutional pillar upholding super-strong deference. Section A explains why super-strong deference fails to respect the Constitution's separation-of-powers scheme by disregarding checks and balances. Section B then demonstrates the "constitutional blasphemy"<sup>18</sup> that *Egan* and super-strong deference have wrought in lower courts, which has left plaintiffs who have racial discrimination claims arising from security clearance revocations without a forum.

Part III addresses the second pillar propping up super-strong deference: the functional claim that executive agencies are comparatively more competent than courts to tackle legal issues implicating foreign affairs.<sup>19</sup> Bureaucratic decisionmaking is characterized by rigid adherence to standard operating procedures. In the absence of oversight, which courts are usually in a strong institutional position to conduct, the resulting policies are frequently dysfunctional. By abdicating its duty to check agency power in the security clearance context, the judiciary has fortified a system that makes Americans less safe. Specifically, the judiciary has enabled a systematic denial of clearances to candidates with foreign connections, depriving the United States of the operational skill and the legitimacy to wage a successful war on terror.

Part IV will show how lower courts can, consistent with existing Supreme Court precedent, reopen independent judicial review of the merits of security clearance determinations to adjudicate a plaintiff's

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16. See *supra* note 2 and accompanying text.

17. See *supra* note 7 and accompanying text.

18. See Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 551 (1997) (using these words to characterize Justice Scalia's dissent in *Webster v. Doe*, 486 U.S. 592 (1988), which counseled against providing a forum for plaintiffs raising sexual orientation discrimination as a constitutional violation arising from security clearance revocations).

19. See *supra* note 7 and accompanying text.

equal protection constitutional claims. The Part then suggests ways in which courts can make plaintiffs whole. Professor Walter Dellinger drew a helpful distinction between using the Constitution as a “shield” and as a “sword” to provide injured plaintiffs with a remedy for constitutional violations.<sup>20</sup> To draw on the Constitution as a shield is to stop the government from inflicting injury, utilizing equitable or injunctive relief to block impermissible government behavior.<sup>21</sup> To use it as a sword is to wield it for an affirmative purpose, finding that the Constitution itself authorizes a cause of action and damage remedy against the government’s officers.<sup>22</sup> This Part argues that lower courts can and should feel free to employ both remedies when confronted with colorable equal protection claims arising out of an adverse security clearance determination. Finally, this Part will shed light on how to deter future discriminatory agency rulings and avoid a chilling effect on agency adjudicators.

#### I. DEMYSTIFYING THE SECURITY CLEARANCE PROCESS

When the government issues a security clearance, it has determined that an individual is fit to access classified information.<sup>23</sup> Although comprehensive statistics are unavailable, the best estimates suggest that at least 2.5 million positions across executive agencies in the areas of national defense, homeland security, and foreign policy require security clearances.<sup>24</sup> Classified information is divided into three levels based on its “sensitivity,” or the level of harm that its disclosure would inflict on national security: Confidential, Secret, and Top Secret.<sup>25</sup> There are three corresponding levels of security clearances.<sup>26</sup>

To obtain a security clearance, candidates must complete a three-stage process: application, investigation, and adjudication.<sup>27</sup> The first stage involves completing an application form, which asks for essential background information, such as where the candidate has lived, attended school, and traveled, as well as more personal information related to the

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20. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972).

21. *Id.*

22. *Id.*

23. Exec. Order No. 12,968, 3 C.F.R. 391 (1995), reprinted in 50 U.S.C. § 435 (2006).

24. REYES, *supra* note 9, at 4.

25. *Id.* at 4–5.

26. *Id.* at 5.

27. *Id.*

candidate's criminal history, financial situation, and drug or alcohol use.<sup>28</sup> In the second stage, the investigation, agency investigators gather in-depth information about a candidate in a series of standard areas, through such means as agency database checks and field interviews of a candidate's neighbors.<sup>29</sup> Even after receiving a clearance, one must undergo periodic reinvestigations.<sup>30</sup>

The third stage, adjudication, entails the relevant agency reviewing the results of the investigation to render a determination of fitness for a security clearance.<sup>31</sup> The overriding standard is that a clearance may only be granted when it is "clearly consistent with the interests of national security."<sup>32</sup> A series of thirteen decision points are used as baseline criteria to render this judgment, ranging from "[f]oreign preference" and "[a]llegiance to the United States" to "[f]inancial considerations" and "[s]exual behavior."<sup>33</sup> Through a process known as the "whole person concept," adjudicators weigh weaknesses in these areas against mitigating factors to make a holistic evaluation of the candidate.<sup>34</sup> For example, dual citizenship is considered a weakness under the "[f]oreign preference" category, but can be mitigated if the dual citizenship is due to parents' citizenship or birth in a foreign country and if the individual expresses a willingness to renounce foreign citizenship.<sup>35</sup> Doubts about a candidate's fitness are to be resolved in favor of national security.<sup>36</sup>

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28. *Id.* at 9. The form is known as Standard Form (SF)-86. *Id.* at 5.

29. COUNCIL ON SEC. & COUNTERINTELLIGENCE, INTELLIGENCE & NAT'L SEC. ALLIANCE, IMPROVING SECURITY WHILE MANAGING RISK: HOW OUR PERSONNEL SECURITY SYSTEM CAN WORK BETTER, FASTER, AND MORE EFFICIENTLY 1, 21 (2007), available at <http://www.insaonline.org/assets/files/INSA-WPaper-Version%202.pdf>. Since 2005, the Office of Personnel Management has led investigations on behalf of the vast majority of agencies, including the Department of Defense, whose uniformed, civilian, and industry personnel hold more security clearances than any other agency. Agencies within the Intelligence Community, whose personnel hold approximately 10 percent of clearances, as well as the Department of Homeland Security and Department of State, conduct their own investigations. REYES, *supra* note 9, at 5-6.

30. REYES, *supra* note 9, at 5. Those with Top Secret clearances are reinvestigated every five years, those with Secret clearances every ten years, and those with Confidential clearances every fifteen years. *Id.*

31. *Id.*

32. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. § 147.2 (2008).

33. *Id.*

34. *Id.*

35. See *id.* § 147.5 (listing the criteria and mitigating factors for making determinations related to the foreign preference category).

36. *Id.* § 147.2.

When clearances are denied or revoked, candidates may request an appeal in which they are entitled to certain procedural safeguards, including notice as to the decision's justification, a reasonable opportunity to respond, outside counsel, and the opportunity to cross-examine individuals who have made adverse statements about the candidate related to an issue underlying the security clearance determination.<sup>37</sup>

Within these parameters, the precise nature of the adjudicative process varies agency by agency.<sup>38</sup> The Department of Defense's (DoD) process for federal government contractors can be considered representative.<sup>39</sup> After an initial adverse decision by the Defense Office of Hearing and Appeals (DOHA), the candidate is given a Statement of Reasons (SOR) underlying the decision and may request a DOHA hearing before an administrative judge.<sup>40</sup> The DoD must furnish the candidate with the evidence that will be presented to substantiate the allegations in the SOR.<sup>41</sup> At the hearing, both sides present their cases to the judge and the candidate is able to present witnesses and other documented evidence to rebut the reasons underlying the adverse security clearance determination.<sup>42</sup> The judge then applies the national security standard to reach a decision.<sup>43</sup> Both parties can appeal the decision to a three-judge DOHA appeals board.<sup>44</sup> The board's standard of review is highly deferential to the hearing.<sup>45</sup> The board is principally charged with ensuring that the findings of fact were "supported by such relevant evidence as a reasonable mind might accept as adequate" and that the decision was not "arbitrary, capricious, or contrary to law."<sup>46</sup> The standard of review is worded similarly to the Administrative Procedure

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37. Exec. Order No. 10,865, 3 C.F.R. 398 (1959–1963) (promulgated Feb. 20, 1960), *reprinted as amended* in 50 U.S.C. § 435 (2006). The Executive Order was issued in the aftermath of *Greene v. McElroy*, 360 U.S. 474 (1959), in which the Court held that candidates were entitled to the "safeguards of confrontation and cross-examination" in the absence of express authorization stating otherwise from the president or Congress. *Id.* at 508.

38. Miller, *supra* note 15, at 235.

39. *Id.*

40. 32 C.F.R. pt. 155 app. A (2008).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*; see also Sheldon I. Cohen, Appeal Board Decisions of the Defense Office of Hearings and Appeals: Are They Arbitrary and Capricious? 3–4 (July 2006), <http://www.sheldoncohen.com/publications/DOHA%20Appeal%20Board%20Decisions,%20Sec.%2002s1.pdf> (characterizing the level of review authorized as very limited in scope).

46. 32 C.F.R. pt. 155 app. A.

Act (APA),<sup>47</sup> which authorizes federal courts of appeals to review agency actions.<sup>48</sup> A striking difference from the APA, however, is that the DOHA appeals board is not authorized to review for “abuse of discretion.”<sup>49</sup> They are also not authorized to review the facts *de novo*.<sup>50</sup>

## II. *EGAN* AND ITS PROGENY AS CONSTITUTIONAL BLASPHEMY

This Part lays bare the inherent defects of the constitutional pillar upholding super-strong deference to executive power and stresses the importance of the judiciary supplying adequate remedies for constitutional wrongs. Section A will draw on the reasoning of *Egan* to show that the failure of super-strong deference to account for checks and balances represents a corrupt understanding of the Constitution’s separation of powers. Section B will show that the courts of appeals, when confronted with plaintiffs raising constitutional claims not presented by *Egan*, have relied on the super-strong deference canon to foreclose review of the merits of adverse security clearance determinations.

### A. *Egan and the Constitutional Pillar Supporting Super-Strong Deference*

In *Egan*, the Court found that the Constitution demands super-strong deference to the executive on matters touching foreign affairs.<sup>51</sup>

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47. 5 U.S.C. §§ 551–59, 701–06 (2006).

48. *See id.* § 702 (“A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.”).

49. *Compare* 32 C.F.R. pt. 155 app. A (allowing review to determine whether the “rulings or conclusions are arbitrary, capricious, or contrary to law”), *with* 5 U.S.C. § 706(2)(A) (authorizing the reviewing court to hold unlawful actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

50. *Compare* 32 C.F.R. pt. 155 app. A (limiting the reviewing court to deferential review of the Administrative Judge’s findings, review of procedure, and review for “arbitrary [and] capricious” rulings), *with* 5 U.S.C. § 706(2)(F) (establishing that “[i]n making . . . determinations, the court shall review the whole record” and may overturn rulings based upon factual determinations “subject to trial de novo”).

51. *See* *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief.”); Eskridge & Baer, *supra* note 4, at 1101 (cataloging various deference paradigms and placing *Egan* within its “super-strong” deference paradigm). The most famous case to articulate super-strong deference to the executive was *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which held that “congressional legislation . . . within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” *Id.* at 320.



Importantly, the Court had a range of less deferential standards at its disposal, embodied in cases such as *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>52</sup> *Skidmore v. Swift & Co.*,<sup>53</sup> and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>54</sup> Yet the Court chose to invoke super-strong deference, alleging that the standard was derived from the Constitution's separation of powers and declaration that the president is "Commander in Chief of the Army and Navy of the United States."<sup>55</sup> In fact, the Court said that the foreign affairs arena is to be considered the "province and responsibility of the Executive."<sup>56</sup> Moreover, the ability to classify and control access to intelligence represents a power inherent to the executive, existing "quite apart from any explicit congressional grant."<sup>57</sup> The practical implication of this super-strong deference, then, is that courts should grant "the utmost deference" to the executive in matters involving foreign affairs, resisting encroachment unless Congress expressly authorizes otherwise.<sup>58</sup> In light of this vision, the Court in *Egan* held that the Merit Systems Protection Board, an administrative body created to hear appeals from adverse actions against government employees, could not review the substance of security-clearance

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52. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *Youngstown* "rejected the . . . vision of unrestrained executive discretion in favor of a normative vision of the policy-making process in which the three branches of government all play integral roles." HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 112–13 (1990).

53. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Instead of reflexively granting deference, the *Skidmore* standard calls on courts to evaluate an executive agency's interpretation for the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

54. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* standard dictates that unless the legislative branch has directly addressed the interpretative issue, then a court must defer to an executive agency's reasonable interpretation of a statute that it administers. *Id.* at 842–43. On the continuum of deference standards, *Chevron* can be considered only marginally more scrutinizing than super-strong foreign affairs deference. See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 783–85 (2004) (describing how the application of *Chevron* to agency preemption of state law claims has enabled agency insensitivity to federalism concerns). For calls to apply *Chevron* deference in foreign affairs, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 725–26 (2000); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1227–28 (2007). For a thoughtful critique of applying *Chevron* in foreign affairs, see Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1282–83 (2007).

55. *Egan*, 484 U.S. at 527 (quoting U.S. CONST. art. II, § 2, cl. 1).

56. *Id.* at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)).

57. *Id.* at 527.

58. *Id.* at 530 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

determinations because it was not expressly authorized by statute to do so.<sup>59</sup>

*Egan's* pronouncement of sweeping executive power and call for super-strong deference represents a superficial and flawed view of the separation of powers. To understand why, one must take a step back to gain a better grasp of the purpose and architecture of the Constitution. The Framers divided the government into branches to diffuse power and guard against tyranny.<sup>60</sup> The structure of the document confirms this purpose by embedding a notion of checks and balances.<sup>61</sup> That is, it generally grants branches the authority to carry out functions that check, and are checked by, the other branches. For example, a plain reading shows that the Constitution distributes powers related to foreign affairs across the branches, rather than vesting those powers exclusively in the executive.<sup>62</sup> The Constitution assigns authority to Congress to regulate international commerce, form and maintain armed forces, and declare war.<sup>63</sup> Furthermore, courts are vested with the authority to adjudicate all cases and controversies properly brought before them.<sup>64</sup> As Chief Justice

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59. *Id.* at 518.

60. See *Loving v. United States*, 517 U.S. 748, 756 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."); THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961) (stating that "the great security against a gradual concentration of the several powers in the same department consists in giving . . . each department the necessary constitutional means and personal motives to resist encroachments of the others"); Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 316 (1995) ("Functions are separated to avoid amassing undue governmental power, to protect against governmental tyranny.").

61. See, e.g., *Reid v. Covert*, 354 U.S. 1, 17 (1957) ("The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.").

62. See Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 806 (1989) (arguing that the Constitution confers foreign affairs powers across the branches).

63. U.S. CONST. art. I, § 8. Some scholars argue that the Article II Vesting Clause provides the executive branch with a sweeping grant of foreign affairs power, limited only by the powers specifically listed elsewhere in the Constitution. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 254 (2001) ("Foreign affairs powers not assigned elsewhere belong to the President, by virtue of the President's executive power; while foreign affairs powers specifically allocated elsewhere are not presidential powers, in spite of the President's executive power."). The text and history of the Vesting Clause, however, suggest that this interpretation is untenable. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551–52 (2004).

64. U.S. CONST. art. III, §§ 1–2; see also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937–44, 975–76 (1988) (arguing

John Marshall said in *Marbury v. Madison*:<sup>65</sup> “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>66</sup> Nowhere does the Constitution hint that the judiciary’s obligation ends when a matter touches foreign affairs.<sup>67</sup> In fact, if courts were to abdicate their duty, the separation of powers scheme would be threatened as the courts mutated into a “partner in the transgressions of the political branches, instead of a bulwark between them and the individuals who sought the Court’s protection.”<sup>68</sup>

This latter point deserves special emphasis, especially when an individual is seeking judicial protection from a constitutional violation. It is widely recognized that a chief function of the judiciary is to supply adequate remedies for constitutional wrongs.<sup>69</sup> In accord with this

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that the text of these provisions and the values they represent require federal appellate review of constitutional issues decided by administrative agency adjudications).

65. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

66. *Id.* at 163. The Court quoted this language favorably in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which it, for the first time, inferred a legal entitlement to damages against individual federal officers directly under the Constitution. *Id.* at 397. Professor Curtis Bradley, who argues for a deferential *Chevron* canon in foreign affairs, has characterized the position advocating greater judicial scrutiny in foreign affairs as the “*Marbury* perspective.” Bradley, *supra* note 54, at 665. It bears mentioning that proponents of super-strong deference also cite John Marshall, referencing a statement he delivered while serving in the House of Representatives in which he asserted that “[t]he president is the sole organ of the nation in its external relations and its sole representative with foreign nations.” See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1679 (2002) (quoting 10 Annals of Congress 613–14) (Washington, Gales & Seaton 1851)); see also *id.* (pointing to Marshall’s statement as evidence of the executive branch’s purported plenary power in foreign affairs). There, however, Marshall was addressing a specific dispute concerning the president’s power to execute U.S. obligations under an extradition treaty and “not making any claim about unspecified substantive powers.” Bradley & Flaherty, *supra* note 63, at 549 n.19.

67. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); Charney, *supra* note 62, at 807 (“[T]he Constitution does not exclude or limit the courts’ authority in cases or controversies touching on foreign relations.”).

68. Bandes, *supra* note 60, at 320; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part) (“Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid.”); Charney, *supra* note 62, at 807 (“Furthermore, matters with foreign relations implications may involve the legal rights and duties of individuals or the states under federal law clearly within the courts’ authority. Judicial deference or abstention in such cases may compromise the authority of the federal courts.”).

69. Bandes, *supra* note 60, at 294; Fallon, *supra* note 64, at 956; see also THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the

venerable principle, the Court has applied the constitutional avoidance canon<sup>70</sup> to statutes that appear to strip courts of their jurisdiction to review violations of individuals' fundamental constitutional rights.<sup>71</sup> That is, courts make every effort to construe such statutes to avoid the serious constitutional doubts that would be raised by denying plaintiffs judicial review for colorable constitutional claims.<sup>72</sup> Because the original constitutional structure should be harmonized with the contemporary explosion of the administrative state, it is particularly important to preserve judicial review when executive agencies deprive individuals of their rights.<sup>73</sup> One scholar has gone so far as to say that an agency action that precludes judicial review of constitutional claims amounts to "constitutional blasphemy."<sup>74</sup> Precluding review, the argument goes, would extend a "standing invitation" to agencies to exceed their powers

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"independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . the influence of particular conjunctures[] sometimes disseminate[s] among the people themselves"); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1486 (1987) ("[T]hat every person should have a judicial remedy for every legal injury done him was a common provision in the bills of rights of state constitutions; [and] was invoked by *The Federalist* No. 43 in a passage whose very casualness indicated its uncontroversial quality . . . ." (footnote omitted)).

70. "Known colloquially as the avoidance canon, it is most commonly described as providing that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.'" Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1192 (2006) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

71. See *Johnson v. Robinson*, 415 U.S. 361, 361 (1974) (permitting a conscientious objector who had performed alternative service to challenge a federal statute that excluded conscientious objectors from a veterans' benefits program even though the statute specified that no court had the power to review decisions of the Veterans Administration related to the program); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 258 (1985) ("At this point in our history I would be startled to see the Court decide that a litigant pressing a bona fide constitutional claim could be denied access to the independent judgment of a judicial forum.").

72. See *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[A] 'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986))).

73. See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 480 (1991) (referencing the Court's "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action"); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 755 (1992) (noting that judicial review was "part of a constitutional quid pro quo: courts would decline to employ the nondelegation doctrine to overturn statutes and, in return, courts would preserve the power to review agency decisions"); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1612–13 (2000) (describing the history and constitutional importance of preserving judicial review in the administrative law context).

74. Schwartz, *supra* note 18, at 551.

and violate constitutional norms because there would be no independent check on their actions.<sup>75</sup>

A principal concern with granting super-strong deference to the executive on foreign affairs, then, is that it may put the judiciary on a collision course with the equally strong presumption of judicial review of constitutional claims.<sup>76</sup> If confronted with a choice between the two presumptions that the Court did not have to face, lower courts may feel compelled to take the passive course of action out of sheer ease, deferring to political branch power.<sup>77</sup> There is evidence that this is precisely what happened to *Egan's* progeny. When lower courts mixed *Egan's* super-strong deference to the executive with the tangled relationship among constitutional, statutory, and administrative remedies relating to racial discrimination, the remarkable result was complete foreclosure of judicial review for plaintiffs in relation to security clearance revocations.

*B. Egan's Progeny and the Foreclosure of All Remedies for Racial Discrimination Claims*

Although *Egan* only barred an administrative board from reviewing the substance of security clearance determinations involving statutory claims, its sweeping language about deference to the executive, and accompanying presumption against judicial review absent congressional authorization, has compelled lower courts to defer in even constitutional claims implicating security clearances.

Lower courts have weaved together two separate threads of precedent to deny a forum to plaintiffs asserting racial discrimination in security clearance revocations.<sup>78</sup> The first thread of cases stands for the

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75. *Id.*

76. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 730–31 (1990) (describing how the Court employs “a superstrong presumption against preclusion of constitutional claims”).

77. This behavior is consistent with the judiciary’s historical practice in foreign affairs. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 159 (1992) (“[W]hen judges do decide the cases brought to challenge a foreign policy, it may safely be assumed . . . that they would reach out in an effort to agree with the story told by the president’s experts. In all but the most egregious instances, they would find a challenged presidential action constitutional and legal.”).

78. Other commentators have described the foreclosure of judicial review as well. See Mayer, *supra* note 14, at 788–91 (identifying the fact that courts generally refuse to hear security clearance decision challenges on Title VII grounds); Miller, *supra* note 15, at 246 (examining how *Egan* and *Brown v. General Services Administration*, 425 U.S. 820 (1976), combine to foreclose Title VII claims).

proposition that when Congress has crafted a comprehensive remedial scheme, plaintiffs are denied access to other statutory and constitutional remedies. These cases developed as a reaction to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>79</sup> which held that a plaintiff could seek money damages from individual federal officers for violating the Fourth Amendment's prohibition on unreasonable searches and seizures.<sup>80</sup> *Bivens* was groundbreaking because the Court, for the first time, inferred a legal entitlement to damages against individual officers directly under the Constitution.<sup>81</sup> The Court subsequently extended *Bivens* to find causes of action for violations of plaintiffs' due process and equal protection rights under the Fifth Amendment.<sup>82</sup> Since then, however, the Court has retreated by building expansively on two exceptions to constitutional liability articulated in dicta in *Bivens*: 1) when there are "special factors counseling hesitation" and 2) when Congress has enunciated an equally effective substitute.<sup>83</sup> In subsequent cases, the Court has collapsed the two exceptions into one to hold that the existence of a statutory remedial scheme, even if decidedly inferior to that which would be provided by a *Bivens* action, represents a special factor counseling hesitation and precludes constitutional liability.<sup>84</sup> Another case, *Brown v. General Services Administration*,<sup>85</sup> which failed to reference *Bivens*, nevertheless has played an integral role in precluding *Bivens* actions, because it held that Title VII of the Civil Rights Act of 1964<sup>86</sup> supplies the exclusive remedy for racial discrimination in federal employment law.<sup>87</sup>

Lower courts have taken this first thread concerning remedial preclusion and combined it with a second thread of cases, enshrined in *Egan*, which calls on courts to defer to the executive branch on matters

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79. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

80. *Id.* at 397.

81. *Id.*

82. *Davis v. Passman*, 442 U.S. 228, 248–49 (1979).

83. *Bivens*, 403 U.S. at 396–97; *see also* Bandes, *supra* note 60, at 297–98 (describing the expansion of the two exceptions).

84. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 388 (1983) (ruling that the Civil Service Reform Act provided the sole remedy for a federal worker claiming First Amendment violations and defamation after he was demoted allegedly in retaliation for public statements critical of his agency); *see also* Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 357–61 (1989) (listing the cases narrowing *Bivens*' scope).

85. *Brown v. Gen. Servs. Admin.*, 425 U.S. 820 (1976).

86. 42 U.S.C. §§ 2000e to e-16 (2006).

87. *Brown*, 425 U.S. at 835.

pertaining to foreign affairs.<sup>88</sup> Although *Egan* addressed only an administrative review board's authority to review the merits of security clearances, lower courts have applied its super-strong deference to the executive to find that there can be no judicial review of the merits of security clearance determinations absent express congressional authorization.<sup>89</sup> Title VII, which under *Brown* provides the sole avenue of recourse for racial discrimination in the federal government,<sup>90</sup> has been interpreted to lack such an authorization.<sup>91</sup> Weaving these two threads together, then, forecloses judicial review of prospective plaintiffs' claims that require reaching the merits of security clearance determinations. The circuit courts have been unanimous in following this reasoning.<sup>92</sup>

The logic of *Egan*'s progeny is suspect in light of *Webster v. Doe*,<sup>93</sup> decided just four months after *Egan*. In *Webster*, a former Central Intelligence Agency (CIA) electronics technician was terminated pursuant to Section 102(c) of the National Security Act of 1947, which authorizes the Director of the CIA to terminate the employment of any employee at his discretion.<sup>94</sup> Doe produced statements by his superiors suggesting that his security clearance was revoked and his job terminated because the CIA saw his homosexual orientation as posing a threat to

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88. See, e.g., *Perez v. FBI*, 71 F.3d 513, 515 (5th Cir. 1995) (per curiam) (holding that the court lacked subject matter jurisdiction to review the plaintiff's Title VII and *Bivens* claims related to security clearance revocation).

89. See *infra* note 92 and accompanying text.

90. *Brown*, 425 U.S. at 828–30.

91. See, e.g., *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996) (declining to adjudicate the plaintiff's racial discrimination claims because there was "no unmistakable expression of purpose by Congress in Title VII to subject the decision of the Navy to revoke Becerra's security clearance to judicial scrutiny"). Alternatively, some courts have declared that judicial review of the merits of security clearance determinations would run afoul of Title VII's national security exception. See, e.g., *Cruz-Packer v. Chertoff*, 612 F. Supp. 2d 67, 70 (D.D.C. 2009) (declining to review the plaintiff's sexual discrimination claims because 42 U.S.C. § 2000e-2(g) sanctions the termination of "an employee if 'the occupancy of such position . . . is subject to any requirement imposed in the interest of the national security of the United States under any security program . . . [and] such individual has not fulfilled or has ceased to fulfill that requirement.'" (quoting 42 U.S.C. § 2000e-2(g))).

92. *Makky v. Chertoff*, 541 F.3d 205, 218 (3d Cir. 2008); *Bennett v. Chertoff*, 425 F.3d 999, 1000 (D.C. Cir. 2005); *Hill v. White*, 321 F.3d 1134, 1335 (11th Cir. 2003); *Tenenbaum v. Caldera*, 45 Fed. App'x 416, 418 (6th Cir. 2002); *Becerra*, 94 F.3d at 148–49; *Weber v. Buhrkuhl*, No. 95-2554, 1995 U.S. App. LEXIS 36114 (8th Cir. Dec. 21, 1995) (per curiam); *Perez*, 71 F.3d at 515; *Brazil v. Dep't of the Navy*, 66 F.3d 193, 196–98 (9th Cir. 1995); *Hill v. Air Force* 844 F.2d 1407, 1409 (10th Cir. 1988); *Romero v. Dep't of Defense*, 527 F.3d 1324, 1329 (Fed. Cir. 2008).

93. *Webster v. Doe*, 486 U.S. 592 (1988).

94. *Id.* at 595.

national security.<sup>95</sup> Doe presented statutory and constitutional claims related to the alleged employment discrimination.<sup>96</sup> Because Title VII prohibits discrimination only on the basis of race, color, religion, sex, and national origin, and *not* sexual orientation,<sup>97</sup> Doe fell outside its purview. The Court held that Doe's statutory claims under a provision of the APA<sup>98</sup> were precluded by another APA provision that foreclosed judicial review of "agency action . . . committed to agency discretion by law."<sup>99</sup> The APA, however, did not preempt Doe's constitutional claims.<sup>100</sup> The Court declared that there was a strong presumption in favor of judicial review of constitutional claims that could be overcome only by express congressional authorization denying such review.<sup>101</sup> It invoked the constitutional avoidance doctrine in support of this position, noting that a "serious constitutional question" . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."<sup>102</sup> Importantly, the Court rejected the CIA's argument that judicial review would involve inappropriate "rummaging around"<sup>103</sup> in [its] affairs," finding that lower courts could effectively balance the plaintiff's need for access to evidence "against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and missions."<sup>104</sup>

The perplexing result of *Egan* and *Webster* is that plaintiffs claiming racial discrimination have no access to judicial review of the merits of security clearance determinations (because Title VII provides the exclusive remedy and fails to reach security clearance determinations under *Egan's* progeny). Victims of sexual orientation discrimination, conversely, can have courts review the merits of colorable constitutional claims (because sexual orientation falls outside of Title VII and

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95. *Id.*

96. *Id.* at 596.

97. 42 U.S.C. §§ 2000e to e-16 (2006).

98. 5 U.S.C. § 706 (2006). *Webster* charged that the agency action violated the APA because it was arbitrary and capricious. *Webster*, 468 U.S. at 596.

99. *Webster*, 468 U.S. at 597 (quoting 5 U.S.C. § 706).

100. *Id.* at 603 (rejecting petitioner's claim that unconstitutional policies are unreviewable under the APA).

101. *Id.* ("[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." (citing *Johnson v. Robinson*, 415 U.S. 361, 373-74 (1974))).

102. *Id.* (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

103. *Id.* at 604 (quoting Transcript of Oral Argument at 5, *Webster*, 468 U.S. 592 (No. 86-1294)).

104. *Id.*



constitutional claims enjoy their own favorable presumption).<sup>105</sup> In other words, a statute drafted to afford heightened protection to certain groups offers them less protection than groups that fall outside of its purview in this context.<sup>106</sup> This discrepancy reflects deep tensions in the reasoning underpinning the two cases. In other contexts in which *Bivens* actions would ordinarily be foreclosed by a statutory scheme, but the specified alternative has proven inadequate, circuit courts have drawn on *Webster* to reopen a cause of action directly under the Constitution.<sup>107</sup>

### III. *EGAN* AND JUDICIAL ABDICATION TO INSTITUTIONAL INCOMPETENCE: THREATENING NATIONAL SECURITY

In a string of cases related to the war on terror, the Court has refused to find that the executive is constitutionally entitled to super-strong deference in foreign affairs.<sup>108</sup> Indeed, in *Hamdan v. Rumsfeld*,<sup>109</sup> only Justices Scalia and Thomas signed on to this proposition,<sup>110</sup> whereas

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105. Other commentators have described this perplexing outcome as well. See Mayer, *supra* note 14, at 788–91; Miller, *supra* note 15, at 246.

106. Mayer, *supra* note 14, at 788–91; Miller, *supra* note 15, at 246.

107. See *Am. Fed’n of Gov’t Employees Local 1 v. Stone*, 502 F.3d 1027, 1035–39 (9th Cir. 2007) (drawing on *Webster* to hold that Transportation Security Administration security screeners alleging retaliation in violation of their First Amendment rights were entitled to seek equitable relief); *Czerkies v. Dep’t of Labor*, 73 F.3d 1435, 1440–41 (7th Cir. 1996) (relying on *Webster* to hold that a federal employee denied workers’ compensation by an administrative body was entitled to Article III judicial review of his constitutional due process claim). Part IV of this Note will explain why courts should build on this precedent to revisit the current approach to judicial review of security clearances, reopening the option for *Bivens* actions against federal officers who violate plaintiffs’ equal protection rights under the Fifth Amendment.

108. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2271–77 (2008) (invalidating as unconstitutional the statute that stripped federal courts of jurisdiction to hear habeas corpus petitions of accused noncitizen enemy combatants held at Guantanamo Bay); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (declaring military commissions unlawful because they violated the Geneva Convention); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (holding that an American citizen enemy combatant was entitled to due process protections); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that federal courts have jurisdiction under the federal habeas statute to hear challenges to detention raised by detainees held at Guantanamo Bay).

109. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

110. See *id.* at 718–19 (Thomas, J., dissenting) (“Our duty to defer to the President’s understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict.” (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936))); see also Eskridge & Baer, *supra* note 4, at 1185 (“[O]nly two Justices invoked *Curtiss-Wright* deference in *Hamdan*, where it would seem to have been applicable.”).

the dissenters in *Boumediene* left it unstated altogether. The latest trend has been for those advocating deference to do so on functional grounds,<sup>111</sup> contending that the executive branch has several built-in advantages that make it better fit to handle such matters.<sup>112</sup> Section A will show that these arguments rest on a set of optimistic and ultimately misguided assumptions about agency decisionmaking—which, when left unmonitored, is plagued by tunnel vision, path dependency, and imperialist tendencies. Although courts should avoid micromanaging agency tasks, Section B will demonstrate that they are well positioned institutionally to spot and correct glaring deficiencies inherent to agency decisionmaking. Finally, Section C demonstrates that judicial abdication in the context of security clearance revocations threatens the country's national security by leaving flaws endemic to agency decisionmaking unchecked.

As a first order matter, it is imperative to point out that perceived comparative policy advantages should take a backseat to courts' constitutional duties to adjudicate matters properly brought before them and safeguard the rights of individuals from the political branches.<sup>113</sup> In

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111. See Ku & Yoo, *supra* note 7, at 181 (arguing that deference to agency interpretations has a strong functional basis); cf. Paul F. Diehl & Tom Ginsburg, Essay, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239 *passim* (2006) (pointing out that Professors Nzelibe and Yoo, having lost their constitutional arguments, have turned to functional arguments to justify deference to the executive in war-making powers).

112. Professor H. Jefferson Powell has argued for executive primacy in foreign affairs by melding the constitutional and functional arguments. H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 547–48 (1999). He asserts that the Framers conceived of the executive branch as the best equipped to address issues arising in the foreign affairs arena and designed the Constitution accordingly. *Id.* Nevertheless, contemporary deference proposals must still harmonize these animating sentiments of the Founders with the unforeseen expansion of the administrative state. See Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1551–55 (2009) (reconciling the Founders' functionalist views of separation of powers in foreign affairs with contemporary realities); Young, *supra* note 73, at 1612–13 (describing the history and constitutional importance of preserving judicial review in the administrative law context). Because the Founders retained checks and balances over a compact executive in foreign affairs, it is consistent with Powell's interpretation of their intentions to allow judicial oversight over the actions of unelected agency officials when they deprive individuals of equal protection under the law. See discussion *supra* Part II.A. This argument is especially true when doing so produces better policy outcomes. See discussion *infra* Part III.B.

113. Bandes, *supra* note 60, at 302 (describing the fundamental duties of courts to adjudicate cases properly brought before them and check the power of the political branches in the separation-of-powers system). Some scholars go so far as to say that *all* administrative judicial actions must be reviewable by Article III courts. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246–48 (1994) (“Article III requires *de novo* review, of both fact and law, of all agency adjudication that is properly classified as ‘judicial’

particular, when an executive agency's actions violate an individual's constitutional rights, that individual is entitled to an appropriate remedy in an independent judicial forum.<sup>114</sup> Even assuming, *arguendo*, that courts are not constitutionally obliged to remedy such violations, the functional arguments in favor of across-the-board deference to the executive are misguided.

#### A. *The Institutional Drawbacks of Executive Agencies*

Supporters of super-strong deference invoke, either implicitly<sup>115</sup> or explicitly,<sup>116</sup> what political scientists term a “rational choice model” that idealizes executive agencies by imputing supreme rationality and expertise to their decisionmaking. That is, advocates presume that agency workers operate by weighing costs and benefits of proposed courses of action and choosing the optimal one.<sup>117</sup> In doing so, they accumulate vast expertise in their area of practice, which was already a prerequisite for the job.<sup>118</sup> When it comes to foreign affairs specifically, the view of advocates is that the relevant agencies, unlike courts, are “solely focused on designing and implementing foreign policy” and, as a result, possess expertise that makes them better suited to address legal

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activity.”). This Note does not make that argument because the Framers’ intent can be honored by providing an “adequately searching” system of appellate review, rather than a comprehensive system that would compromise the efficiency of agencies and saddle courts with an unworkable docket. *See* Fallon, *supra* note 64, at 918 (defending an “adequately searching” system of Article III review of administrative adjudications). A meaningful system of judicial review would have to include review of an agency’s alleged deprivation of an individual’s constitutional rights. *See id.* at 975–76 (stating that it would be “highly disturbing” if Congress precluded Article III judicial review of constitutional rights violations because of concerns related to separation of powers and fairness to the litigants). Although it is beyond the scope of this Note to flesh out the other elements of an “adequately searching” system of Article III judicial review of agency adjudications, a sound baseline standard can be found in *Skidmore*, which calls on courts to evaluate an executive agency’s interpretation for the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also* Mendelson, *supra* note 54, at 797–98 (describing the benefits of a *Skidmore* approach over a *Chevron* approach in the context of federal preemption of state law claims).

114. *See* discussion *supra* Part II.A.

115. *See* Ku & Yoo, *supra* note 7, at 201 (treating agencies as unitary, rational actors).

116. *Cf.* Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815 *passim* (2007) (employing a rational choice model to understand the behavior of military lawyers).

117. *See* Posner & Sunstein, *supra* note 54, at 1207 (“The normative question is whether the executive’s institutional expertise gives it advantages over courts in this setting as it does in the *Chevron* setting, and the answer is surely yes.”).

118. Ku & Yoo, *supra* note 7, at 202.

issues that arise in the implementation of their mandates.<sup>119</sup> This approach proved persuasive in *Egan*, in which the Court invoked the comparative institutional advantage of executive agencies to support its holding.<sup>120</sup> Noting that the decision to grant or deny security clearances involves a multitude of factors that make it “an inexact science at best,” the Court went on to say that this judgment is best reserved for “those with the necessary expertise in protecting classified information.”<sup>121</sup> The Court stated further that outside bodies certainly could not conduct risk analyses and assess acceptable margins of error with any confidence.<sup>122</sup> As such, the judgments of executive agencies could not be second-guessed.<sup>123</sup>

There is a strong pedigree of support in political science literature that the rational choice paradigm invoked by supporters of deference is inappropriate for understanding agency decisionmaking. In their groundbreaking book *Essence of Decision*, political scientists Graham Allison and Philip Zelikow supply an alternative “organizational processes” model that captures the intricacies of agency decisionmaking and should be used to interrogate claims concerning the relative institutional competency of courts and agencies.<sup>124</sup> Agencies are formed to carry out desirable and complex government functions, such as protecting the environment or analyzing sensitive information about foreign threats.<sup>125</sup> The complexity of the functions requires mass coordination, which is best executed by “dividing labor, specializing according to function, and training members of the organization to perform in routine fashion.”<sup>126</sup> Agencies, then, are like the pin factory analyzed by Adam Smith, where an individual (unfamiliar to the industry) acting alone could produce perhaps a single pin in a day, while a small factory of ten workers who divide and specialize their labor could

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119. *Id.*

120. *See* *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

121. *Id.* (quoting *Adams v. Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969)).

122. *Id.*

123. *Id.*

124. GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 143–96 (2d ed. 1999).

125. *Id.* at 145.

126. *Id.*

produce tens of thousands.<sup>127</sup> Thus, agencies, by establishing standard operating procedures, create capabilities otherwise unimaginable.<sup>128</sup>

The nature of agencies, however, also makes them susceptible to three principal problems: tunnel vision, path dependency, and imperialist tendencies. Tunnel vision refers to the behavior of bureaucrats who diligently comply with their specialized standards of procedures without regard for broader public policy goals or, at times, for the agency's original mission.<sup>129</sup> The Environmental Protection Agency (EPA), for instance, has tended to allocate resources toward eliminating even the most marginal risks associated with an identified hazardous waste site, instead of using some of those resources to pinpoint and mitigate more significant environmental risks.<sup>130</sup>

Tunnel vision leads to path dependency, or the tendency of agencies to stick to a course of action because it is familiar, rather than optimal.<sup>131</sup> When a bureaucrat confronts a novel problem or receives new responsibilities from an external mandate, he or she will not look to serve the purposes or values of external actors, but will assimilate the new with the letter or logic of old procedures.<sup>132</sup> In the process of assimilating, the bureaucrats will not canvass a range of options and choose the optimal course of action.<sup>133</sup> Instead, they will stop with the first method that seems good enough.<sup>134</sup> The result is frequently dysfunctional as "unduly formalized, sluggish, or inappropriate" procedures persist beyond any usefulness.<sup>135</sup>

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127. *Id.* (referencing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 2–3 (Edwin Cannon ed., Random House 1937) (1776)).

128. *Id.*

129. *Id.* at 156 ("Not norms and values but taken-for-granted scripts, rules, and classifications are the stuff of which [organizations] are made." (quoting Paul J. DiMaggio & Walter W. Powell, *Introduction*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 15 (Walter W. Powell & Paul J. DiMaggio eds., 1991))).

130. Mendelson, *supra* note 54, at 781 (referencing STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE 11–13 (1993)).

131. ALLISON & ZELIKOW, *supra* note 124, at 149.

132. *Id.* at 149, 156 ("Having chosen their instruments in the circumstances of the past, they are confined by them as they encounter new circumstances in the future.").

133. *Id.* at 155–56 (describing how agencies employ a logic that emphasizes compliance with procedures, rather than producing favorable consequences).

134. In the parlance of organizational theory, this phenomenon is known as "satisficing." *Id.* at 152, 171; *see also* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 118–20 (4th ed. 1997) (defining the characteristics of the "satisficing administrator").

135. ALLISON & ZELIKOW, *supra* note 124, at 170. Professors Allison and Zelikow go on to note that "[a] program, once undertaken, is not dropped at the point where objective costs outweigh benefits. Organizational momentum carries it easily beyond the loss point." *Id.* at 180.

Agencies' imperialist tendencies, or the propensity to seek greater resources and responsibilities unnecessarily, also present problems.<sup>136</sup> Because "[m]ost organizations define the central goal of 'health' as synonymous with 'autonomy,'" agencies invariably strive for larger budgets, personnel, and areas of operation, rather than realistically assess whether they need greater resources or are best equipped to jump into new territory.<sup>138</sup> Consequently, important policy decisionmaking often becomes bogged down in turf battles among agencies with overlapping missions. An agency may prevail arbitrarily and at the expense of sound public policy.<sup>139</sup>

*B. The Judiciary Is Positioned to Monitor and Remedy Flaws in Agency Decisionmaking*

The point of the foregoing discussion is to question the idealized understanding of executive agency competence invoked by deference proponents and, concomitantly, to counsel against an across-the-board deference regime on matters pertaining to foreign affairs.<sup>140</sup> Proponents of deference properly point out that even if agency decisionmaking is prone to problems, the appropriate inquiry is whether courts can do a better job at resolving the relevant legal issues without creating greater costs.<sup>141</sup> There is, in fact, a strong functionalist case that the benefits of judicial review—allowing a fully independent body with experience interpreting the law across various fields to check the power of executive agencies prone to dysfunctional decisionmaking—outweigh the costs—allowing that body to decide a matter without technical expertise in the field.<sup>142</sup>

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136. *Id.* at 181.

137. *Id.*

138. *Id.*

139. *See, e.g., id.* (referencing an incident in World War II when Japanese diplomatic codes were broken, an interagency battle over control ensued, and the powerful, but ill-equipped, Naval War Plans Division "won the right to 'interpret and evaluate' [the intelligence] . . . [but] [t]he results for the U.S. government were not good" (footnote omitted)).

140. Although this critique principally applies to the advocates of super-strong deference, it can also be extended to those who press for other all-encompassing, highly deferential regimes such as *Chevron* deference in foreign affairs. For a discussion of *Chevron*, see *supra* note 54.

141. *See* Ku & Yoo, *supra* note 7, at 202.

142. *See* Jinks & Katyal, *supra* note 54, at 1262 ("Presidents are nearsighted in a way that other government actors are not, particularly the judiciary, which tends to be farsighted."). Although Professors Jinks and Katyal are critical of deferential regimes in foreign affairs and stress the strengths of the judiciary, they also speak highly of bureaucracies. Their analysis could be strengthened by accounting for the deficiencies in agency decisionmaking that occur absent judicial oversight. As mentioned above, independent judicial review of *all* agency judicial

The judiciary has great institutional strength. Courts daily put into practice the famous John Marshall maxim that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>143</sup> In saying what the law is, courts serve adjudicative and structural checking functions.<sup>144</sup> First, they serve as an independent forum that neutrally interprets and applies the law to determine whether the plaintiff before them claiming injury is entitled to relief.<sup>145</sup> Second, they serve as a check on the political branches of government by seeing that they stay within the confines of their constitutionally granted powers.<sup>146</sup> Typically, judges are generalists who carry out these functions across a wide array of fields, often implicating highly technical and complex issues.<sup>147</sup> Though they may not gain expertise in a particular area of law, it is fair to say that they do accrue expertise in a set of skills that includes “figuring out statutory purpose and harmonizing applications of statutes with legal and constitutional principles.”<sup>148</sup> Importantly, this skill is the one judges must draw on to evaluate whether an agency’s actions violate constitutional rights.

As mentioned, it is true that judges do not possess technical expertise in foreign affairs, but neither this fact, nor the other reasons that purportedly make foreign affairs distinct, warrant abdication. As with complex questions of domestic law, judges can rely on “their personal experience . . . prior decisions of other judges, scholarly writings, codifications of the law and the opinions of experts” to draw informed conclusions.<sup>149</sup> Furthermore, just as with any other area of law, there is no reason to doubt that the adversarial system will produce the necessary factual information to render judgment.<sup>150</sup> As the Court articulated in *Webster*, district court judges have sufficient tools at their disposal, such as the option of in camera proceedings,<sup>151</sup> to ensure an

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actions would likely prove counterproductive, but an “adequately searching” system of appellate review would preserve Article III values and produce better policy outcomes. *See supra* note 113.

143. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

144. *Bandes, supra* note 60, at 303.

145. *Id.* at 303–07.

146. *Id.* at 311–20.

147. *Charney, supra* note 62, at 809.

148. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 164 (1994).

149. *Charney, supra* note 62, at 809.

150. *Id.* at 810.

151. *Webster v. Doe*, 486 U.S. 592, 604 (1988). Section 4 of the Classified Information Procedures Act authorizes courts to permit the government to submit materials to be inspected by the court alone. *See* 18 U.S.C. app. § 4 (2006) (“The court may permit the United States to

adequate factual record and safeguard the methods, sources, and missions of even the top intelligence agency.<sup>152</sup>

Perhaps most importantly, the nature of executive agencies, in which job duties are segmented and workers strictly adhere to standard operating procedures, may not give agencies an appreciable advantage in area expertise over courts after all. Judge Richard Posner, for example, has asked proponents of deference (who have, tellingly, failed to answer) to clarify why “so-called ‘specialists’ who don’t live up to the name (think only of the Immigration and Naturalization Service, which repeatedly in the cases that come before [federal courts] displays its ignorance of foreign countries) forfeit the deference of reviewing courts?”<sup>153</sup> Political scientists have argued powerfully that an executive agency’s purported area of expertise does *not* warrant a regime of deference, because the benefit of providing an independent check on its power actually strengthens decisionmaking by promoting deliberation.<sup>154</sup> Judges, who have a trained eye for seeing how a particular issue fits within a larger policy and constitutional framework, possess distinct competence to remedy and call attention to constitutional violations arising from the tunnel vision, path dependency, and imperialist tendencies that are endemic to agency decisionmaking. As Judge Posner has said, “[t]he courts’ institutional position, allowing judges to see particular applications that legislatures cannot anticipate in advance, puts them in an especially good place to correct absurd applications.”<sup>155</sup>

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make a request for [relief from discovery] in the form of a written statement to be inspected by the court alone.”). Several courts have utilized *ex parte*, in camera proceedings in cases implicating classified information. *See, e.g.*, *United States v. O’Hara*, 301 F.3d 563, 568 (7th Cir. 2002) (affirming the district court’s use of *ex parte*, in camera proceedings to discern whether classified information was discoverable).

152. *Webster*, 468 U.S. at 604.

153. Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 964 (2003); *see also* Cass R. Sunstein & Adrian Vermeule, *A Reply to Posner*, 101 MICH. L. REV. 972 (2003) (failing to reply to Posner’s central critique of their work concerning agency expertise).

154. Diehl & Ginsburg, *supra* note 111, at 1254 (“As a polity moves farther away from consensus and checks and balances, success rates diminish and other harmful effects ensue.”).

155. Posner, *supra* note 153, at 968 (quoting CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 182–84 (1996)).



C. *The Security Clearance Process: Immunization from Judicial Review and the Fortification of Executive Agencies' Institutional Incompetence*

In *Egan* and its progeny, judges have insisted that courts defer to the “institutional expertise” of the executive agencies in making security clearance determinations.<sup>156</sup> With 2.5 million jobs requiring security clearances, it is true that executive agencies hold the potential to streamline the security clearance process by maximizing efficiency and limiting costs. In the absence of oversight, however, executive agencies have turned the security clearance process into a bureaucratic nightmare, plagued by dramatic deficiencies in efficiency and quality. The quality problems in particular are products of agencies’ unchecked tunnel vision, path dependency, and imperialism. In short, the security clearance process was developed at the onset of the Cold War and the quirks of executive agencies have compelled them to cling to the technology, procedures, and attitudes for guarding classified information in a war that the United States is no longer fighting. For instance, a failure of policymakers to account for the tunnel vision of adjudicators has created a system of perverse incentives, encouraging them to systematically deny and revoke security clearances of candidates with even the most tenuous foreign connections.<sup>157</sup> The flawed system has significantly impeded the United States’ capacity (by depriving the federal government of those with critical foreign language skills and cultural expertise) and legitimacy (by alienating the communities most likely to come forward with critical information) to successfully carry out operations in the war on terror. The institution most capable of spotting and remedying these deficiencies in the agency adjudicative system—the judiciary—has abdicated its duty to check agency power and, consequently, has fortified a system that makes Americans less safe.

1. *Efficiency.* Although the problems with quality in the security clearance process will be the focus of this Section, issues concerning agencies’ efficiency bear mentioning as well. There are two primary efficiency concerns: backlog and agency reciprocity. First, the security

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156. See, e.g., *Perez v. FBI*, 71 F.3d 513, 515 n.6 (5th Cir. 1995) (per curiam) (“‘Predictive judgments of this kind’ properly are left to ‘those with the necessary expertise in protecting [the sensitive material,]’ rather than in the hands of ‘an outside nonexpert body’ or the equally nonexpert federal courts.” (quoting *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988))).

157. See, e.g., ISCR Case No. 02-04786 (Defense Office of Hearing and Appeals June 27, 2003) (finding that a female applicant with a single estranged family member overseas was vulnerable to coercion and, consequently, unfit for a security clearance).

clearance process has been plagued by lengthy delays and backlog for at least twenty-five years.<sup>158</sup> The problems persist. A 2004 General Accounting Office report, for example, found that DoD had a backlog of 270,000 investigations and 90,000 adjudications.<sup>159</sup> On average, it took the DoD 375 days to process contractors' clearances.<sup>160</sup> These lengthy delays have negative repercussions: the most qualified candidates often seek employment elsewhere, and critical posts can go unfilled for months on end.<sup>161</sup>

Second, although the government sets forth baseline guidelines for the security clearance process, quality metrics have traditionally varied greatly agency by agency.<sup>162</sup> As a result, many agencies are reluctant to bring on a federal employee or contractor with a clearance from another agency without first undergoing their own extensive investigation and adjudication.<sup>163</sup> The lack of reciprocity poses significant barriers in a world where protecting against terrorist threats requires sharing information and connecting the dots among agencies.

The political branches appear committed to improving the security clearance system's efficiency, even if the results of reform have been somewhat mixed. In 2004, Congress passed and the president signed the Intelligence Reform and Terrorism Prevention Act (IRTPA),<sup>164</sup> which contained a slew of provisions designed to centralize and streamline the process.<sup>165</sup> Since IRTPA's enactment, the president has also issued two executive orders<sup>166</sup> fleshing out guidelines to further reform structure and advance the security clearance process. The reforms have improved timeliness, though a lack of reciprocity persists.<sup>167</sup> The latter problem results mostly from agencies' imperialist tendencies. According to the ranking member of the House Subcommittee on Intelligence Management, Darrell Issa, "[t]he problems with security clearance reform do not seem to be ones of money or even ideas. The real issues

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158. REYES, *supra* note 9, at 7.

159. *Id.*

160. *Id.*

161. COUNCIL ON SEC. & COUNTERINTELLIGENCE, *supra* note 29, at 1, 8.

162. REYES, *supra* note 9, at 8.

163. *Id.*

164. Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

165. 50 U.S.C. § 435b (2006).

166. Exec. Order No. 13,381, 70 Fed. Reg. 37,953 (June 27, 2005); Exec. Order No. 13,467, 73 Fed. Reg. 38,103 (June 30, 2008).

167. REYES, *supra* note 9, at 3.

seem to be stubbornness and a refusal to embrace system-wide efficiency over agencies' proprietary desire to control the clearance process."<sup>168</sup>

2. *Quality*. "If you didn't come over on the Mayflower, you can't get a clearance."<sup>169</sup> Notably, none of the recent reforms take aim at the deep-seated quality problems in the security clearance process. Indeed, the Democratic chair<sup>170</sup> and the Republican ranking member<sup>171</sup> of the House Subcommittee on Intelligence Management, as well as the former Director of National Intelligence,<sup>172</sup> have all criticized the status quo for needlessly excluding individuals from critical communities and have stated a desire for a more diverse federal workforce. But none of them has introduced meaningful reform. Perhaps these and other political leaders are reluctant to tinker with a process they do not fully grasp. Yet, there is mounting evidence that agencies' tendency toward path dependency and tunnel vision impedes the quality of the national security clearance process.

First, there is a pronounced problem of path dependency, particularly in the investigative and adjudicative stages. The system was hatched at the onset of the Cold War and remains tethered to that bygone era.<sup>173</sup> Perhaps field investigations made sense in the 1940s when neighborhoods were more closely knit and investigators could credibly glean intimate details bearing on a candidate's credibility from neighbors.<sup>174</sup> In today's increasingly mobile society, field investigations

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168. *Id.* at 20.

169. Stan Crock, *If You Didn't Come over on the Mayflower, You Can't Get a Clearance*, BUS. WK., Feb. 2, 2004, at 54, available at [http://www.businessweek.com/magazine/content/04\\_05/b3868083.htm](http://www.businessweek.com/magazine/content/04_05/b3868083.htm).

170. See *Security Clearance Reform: Hearing Before the Subcomm. on Intelligence Community Management of the Permanent Select Comm. on Intelligence*, 110th Cong. 1 (2008) (statement of Rep. Eshoo, Chairwoman, Subcomm. on Intelligence Community Management) ("[W]e tended to exclude people who had relatives overseas. This meant that our Intelligence Community was not very diverse. Today we need people who can blend this all over the world.").

171. See *id.* at 3 (statement of Rep. Issa) ("[W]e should not assume that individuals' allegiances are suspect simply because they have friends or family in the Middle East.").

172. See Walter Pincus, *Incoming Intelligence Chief Plans to Ease Hiring of Arabs*, WASH. POST, Feb. 7, 2007, at A15 (citing then-Navy Vice Admiral John M. McConnell's commitment to discard outdated security clearance procedures and hire more first-generation Arab-Americans).

173. See COUNCIL ON SEC. & COUNTERINTELLIGENCE, *supra* note 29, at 11 ("Thirteen of the fourteen 'decision points' currently used to evaluate if a candidate is eligible for a security clearance are vestiges of the system created in the 1940s. Since then, society, our ways of communicating, and perhaps the reasons why individuals spy have changed.").

174. *Id.*

involving subjective or outmoded questions (such as “Does the applicant drink a lot?” or “[D]oes the applicant live within his means?”)<sup>175</sup> are likely to yield either blank stares or incredibly varied responses.<sup>176</sup> Neither is particularly useful for determining fitness to access classified information.

In the adjudication stage, thirteen out of the fourteen decision points used today to evaluate a candidate’s fitness are remnants of the original Cold War system.<sup>177</sup> There was no hard evidence at the time that these decision points represented the optimal criteria for assessing a candidate’s suitability to access sensitive information. Today, there would seem to be even less reason to cling to the criteria given that “society, our ways of communicating, and perhaps even the reasons why individuals spy have changed.”<sup>178</sup> Adjudicators have applied three of these decision points, “allegiance to the United States,” “foreign preference,” and “foreign influence,”<sup>179</sup> to deny or revoke en masse security clearances for candidates with foreign connections.<sup>180</sup> There are unquestionable justifications underpinning these decision points, but they can nevertheless be used merely as a pretext for discrimination. The allegiance criterion ensures that a candidate charged with safeguarding a nation’s most important secrets has unwavering loyalty to the United States.<sup>181</sup> It can, however, be invoked to disqualify an individual who has tenuous associations with individuals or groups who have purportedly expressed hostility to the United States.<sup>182</sup> The foreign influence criterion ensures that a close family member or strong financial interest overseas cannot be leveraged as pressure to reveal sensitive information to a hostile entity.<sup>183</sup> It can, however, be invoked to disqualify a candidate solely because family members live abroad, even when they are estranged and the candidate exhibits unwavering fidelity to the United

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175. *Id.* at 5, 11.

176. *See id.* at 11 (referencing the questions from the Cold War era that are still used today).

177. *Id.*

178. *Id.* at 14.

179. 32 C.F.R. § 147.2 (2008).

180. For a discussion of “tunnel vision,” see *infra* text accompanying notes 185–87.

181. 32 C.F.R. § 147.3.

182. *Makky v. Chertoff*, 541 F.3d 205, 218 (3d Cir. 2008) (refusing to reach the merits of a Department of Transportation security clearance adjudication that revoked plaintiff’s security clearance because of undefined ties to associates in Egypt).

183. 32 C.F.R. § 147.4.

States such that there is no reason to believe that he or she would compromise national security out of personal interest.<sup>184</sup>

Another key quality impediment is tunnel vision, which is the primary explanation for adjudicators' systematic denial or revocation of security clearances for those with foreign ties. Recall that adjudication is the final stage of the clearance process, so an adjudicator, particularly an appeals adjudicator, is the last line of defense against a spy or otherwise unfit candidate handling sensitive information.<sup>185</sup> If the adjudicator signs off on the clearance request of a candidate who eventually engages in traitorous activity, then superiors can readily pin blame on that adjudicator with damaging consequences sure to follow. Under this ominous cloud, adjudicators, in all probability, view their duty as rigidly policing the decision points to safeguard against even marginal risks. In the wake of the traumatizing terrorist attacks carried out on September 11, 2001, one would expect their eye for suspect information to have become sharper, resulting in a greater rate of denial. For example, when a concern is raised about a candidate under the allegiance to the United States, foreign preference, and foreign influence criteria,<sup>186</sup> an adjudicator would presumably have a strong, perhaps irrebuttable, institutional bias against granting the candidate a clearance. Importantly, per the "organizational processes" model, one would not expect an adjudicator to consider that broader agency goals, such as recruiting from critical communities, may be impeded by rigid application of the decision points—especially when they are not incorporated into the rules and standards she is to apply, agency officials never tell her to consider them, and there is no judicial review of her decision.<sup>187</sup> Moreover, even if the adjudicator were advised to consider such goals, her personal interest would be to continue rigid policing. A spy can be traced directly back to her, whereas the failure to achieve a broader agency objective has more diffuse culpability.

Empirical evidence confirms that these perverse incentives bear out their expected consequences. As a caveat, there are obstacles to collecting reliable data. No agency publishes statistics related to its security clearance decisions and only one appeals board, DOHA, publishes its decisions.<sup>188</sup> DOHA addresses contractors' employees and

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184. See *supra* note 157.

185. For a discussion of the third stage of the application process, see *supra* Part I.

186. 32 C.F.R. § 147.2.

187. For a discussion of the drawbacks of executive agencies, see *supra* Part III.A.

188. Cohen, *supra* note 45, at 8 n.25.

not all DoD cases. Nevertheless, its evidence demonstrates that appeals judges: 1) have a strong institutional bias against granting clearances in cases before them and 2) systematically deny or revoke the security clearances of candidates with foreign connections (that is, cases in which foreign influence or foreign preference challenges are raised against them). One study analyzed the 898 DOHA appeals decided between January 2000 and May 2006.<sup>189</sup> It found that in cases in which the trial court had denied a clearance, candidates secured a reversal on appeal a mere 0.83 percent of the time, whereas the DoD prevailed in a stunning 73.9 percent of cases it appealed.<sup>190</sup> The disparity was even starker in foreign influence and foreign preference cases. In the 144 cases in which the trial court denied a clearance on the basis of either foreign influence or preference, the appeals board affirmed every time.<sup>191</sup> In the forty-nine cases implicating the same issues in which the trial court granted a clearance and the DoD appealed, however, the appeals board affirmed only four decisions and reversed forty-five.<sup>192</sup> Thus, the grim reality is that of the 193 appeals involving a candidate with a foreign relative or connection, the appeals board allowed a clearance to be granted in only four cases, each with atypical circumstances.<sup>193</sup>

Given the appeals board's limited scope of review, these disparate results simply cannot be reconciled with sound legal principles. For example, the forty-five reversals of decisions for the candidate on foreign influence or preference issues were originally decided by thirty-one different trial judges.<sup>194</sup> As the author of the study, Sheldon Cohen, notes, the appeals board's reasoning calls on observers to reach the improbable conclusion that these thirty-one different judges, who presumably have a grasp of the law and routinely apply it to varied fact patterns, all weighed the evidence in a manner that was "arbitrary, capricious, or contrary to law" in the 92 percent of cases in which they granted clearances, and yet competently weighed the evidence in 100 percent of the foreign influence and foreign preference case in which they denied clearances.<sup>195</sup> A more plausible interpretation is that appeals judges are following their perverse incentives and putting a legal gloss on an unstated policy of denying clearances to those with foreign ties.

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189. *Id.* at 2.

190. *Id.* at 8.

191. *Id.*

192. *Id.*

193. *Id.* at 8–9.

194. *Id.* at 8.

195. *Id.*

Cohen indeed finds support for this proposition by cataloging the contorted legal reasoning appeals judges invoke to depart from precedent and deny clearances in many of the foreign influence and foreign preference cases. For example, to reverse a favorable determination, an appeals judge frequently will say that the trial judge used “piecemeal analysis” that amounted to being arbitrary or capricious.<sup>196</sup> In one case, the trial judge granted a clearance to a candidate from Taiwan.<sup>197</sup> The appeals board found that the correct legal standard was used, but because the trial judge mentioned that Taiwan was a friendly country to the United States without mentioning that sometimes friendly countries also engage in spying, the analysis was “piecemeal” and therefore arbitrary and capricious.<sup>198</sup> Another device the appeals board employs is pointing to evidence in the record that the trial judge failed to consider—no matter how trivial—and then reversing the decision.<sup>199</sup> In one case, the trial judge granted a clearance to a candidate from Iran, taking into consideration her country of origin and the fact that she “decided to leave Iran in order to pursue a life free of the dictatorship imposed by the ruling fundamentalist regime.”<sup>200</sup> The appeals board reversed, finding that the judge failed to consider the “significant record evidence” that Iran is hostile to the United States, thereby rendering the decision an “arbitrary and capricious action.”<sup>201</sup> Importantly, however, Cohen points out that when the appeals board concurs with the outcome of a trial decision in which potentially key evidence is omitted, the appeals board will affirm, rationalizing that the omission was merely “harmless error.”<sup>202</sup> The most frequently used device to deny a clearance to a candidate with family members living overseas is to require an impossible burden of proof.<sup>203</sup> The primary

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196. *Id.* at 28.

197. *Id.* (referencing ISCR Case No. 02-22461 (Defense Office of Hearing and Appeals Oct. 27, 2005)).

198. *Id.* at 28–29 (referencing ISCR Case No. 02-22461).

199. *See id.* at 23–24 (citing the trivial failures of judges).

200. *Id.* at 24 (quoting ISCR Case No. 02-00318 (Defense Office of Hearing and Appeals Feb. 25, 2004)).

201. *Id.* at 26 (quoting ISCR Case No. 02-00318). Cohen appropriately notes that the appeals board’s reasoning presumes that the trial judge had not read a newspaper or an appeals board opinion concerning Iran in the last thirty years. *Id.*

202. *Id.* at 25 (referencing ISCR Case No. 02-02892 (Defense Office of Hearing and Appeals June 28, 2004) (ruling that the trial judge’s failure to consider that the candidate’s contacts with his Saudi Arabian family were sporadic was harmless error)).

203. *Id.* at 18 (“In case after case every variety of argument by an applicant has been rejected.”).

concern with family abroad is that a foreign agent could abduct and use them as leverage to coax classified information.<sup>204</sup> DOHA has developed a rule that candidates prove the impossible and show not only that the family members had never been coerced by a foreign government in the past but that they would never be coerced in the future.<sup>205</sup> Even if candidates can demonstrate that they are estranged from their overseas relatives<sup>206</sup> or affirm that they are sufficiently loyal to the United States so as not to compromise national security out of self-interest,<sup>207</sup> they will still lose.

The problems of path dependency and tunnel vision are not easily correctable with internal agency reforms.<sup>208</sup> First, path dependency, by its very definition, dictates that agencies hew to suboptimal courses of action merely because they are familiar. Second, it is difficult to imagine an internal restructuring that could escape the perverse incentives created by tunnel vision. As long as an agency official is the last to sign off on a security clearance, then that official's incentive will be to over-police the guiding criteria because a spy can be traced directly back to her, whereas the blame for failing to realize an agency objective is shared across the agency. The best way, then, to spur change and alter the incentive structure is for a judge, insulated from the agency's culture, to look over the agency's shoulder and correct its practices when they are inconsistent with the Constitution.

3. *The Adverse Impact of Unchecked Agencies on the United States' National Security.* The harms inflicted on national security by the status quo cannot be overstated. The bipartisan 9/11 Commission Report described a dire need to attract first- and second-generation Americans, particularly those with Arabic language skills and Middle

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204. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, 32 C.F.R. § 147.4 (2008) ("Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.").

205. Cohen, *supra* note 45, at 18.

206. See *supra* note 157.

207. See ISCR Case No. 05-10108 (Defense Office of Hearing and Appeals June 22, 2006) (denying a security clearance to an applicant because of family members living overseas even though the adjudicator agreed he was "a loyal and trustworthy citizen of the U.S. who served in the Army with distinction").

208. For a discussion of the drawbacks of executive agencies, see *supra* Part III.A.



Eastern cultural competency.<sup>209</sup> At the time, the report pinned much of the blame on the cumbersome and primitive security clearance process.<sup>210</sup> Today, Lee Hamilton, the vice chairman of the commission, laments the same lack of representation and the same obstacles, writing that “the better you know a critical language, culture, or people, the less likely you are to get a security clearance.”<sup>211</sup>

The systematic exclusion of those with the relevant expertise impedes our operations and undercuts our legitimacy in the war on terror. It harms the country’s operations in three fundamental ways. First, agencies lack the diversity of agents necessary to gather human intelligence on terrorist organizations.<sup>212</sup> Credibly penetrating and gathering intelligence on a pan-ethnic terrorist network like Al-Qaeda requires having a pan-ethnic workforce.<sup>213</sup> Second, agencies lack the linguists to translate reams of intelligence that remain unparsed in languages like Arabic or Urdu.<sup>214</sup> In 2006, for example, the Iraq Study Group reported that of the one thousand people working in the U.S. Embassy in Iraq, only thirty-three spoke Arabic and only six spoke it fluently.<sup>215</sup> Third, the status quo perpetuates a law enforcement culture that privileges establishing guilt by association over the more difficult and important task of uncovering genuine terrorist threats to the

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209. See THE 9/11 COMMISSION REPORT 91–92 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (enumerating the problems associated with lack of diversity in the intelligence community).

210. See *id.* at 92 (“Security concerns also increased the difficulty of recruiting officers qualified for counterterrorism. . . . Many who had traveled much outside the United States could expect a very long wait for initial clearance. Anyone who was foreign-born or had numerous relatives abroad was well-advised not even to apply.”).

211. Lee Hamilton, *Intelligence Challenges Await Obama*, INDIANAPOLIS STAR, Dec. 29, 2008, at A12.

212. See Frank Cilluffo, *How Can the U.S. Improve Its Human Intelligence?*, WASH. TIMES, July 6, 2008, at M11 (detailing how the lack of diversity and foreign language proficiency in the intelligence community prevents the United States from gathering human intelligence on Al-Qaeda).

213. *Id.*

214. See Harry Levins, *Supply of Arabic Students Falls Far Short of America’s Demand*, ST. LOUIS POST-DISPATCH, Dec. 13, 2004, at A1 (attributing to Heritage Foundation expert James Carafano the observation that intelligence agencies are “awash in untranslated gleanings of intelligence in Arabic”).

215. JAMES A. BAKER III ET AL., THE IRAQ STUDY GROUP REPORT 92 (2006) (“All of our efforts in Iraq, military and civilian, are handicapped by Americans’ lack of language and cultural understanding.”).

homeland.<sup>216</sup> In the security clearance process, for example, expending scarce resources to ferret out tenuous associations and painstakingly policing Cold War decision points makes little sense, especially considering that the notorious spies have been those who began with clean records and good intentions but became disaffected and betrayed their country.<sup>217</sup>

In addition to hurting national security in an operational sense, the current approach imputes disloyalty and breeds mistrust within communities that could provide needed intelligence.<sup>218</sup> As stated, the current process needlessly excludes those with foreign connections in general and those with Middle Eastern backgrounds, language skills, and expertise in particular. Such exclusion undercuts the legitimacy of law enforcement efforts in relevant communities. As Professor David Cole has said,

One critical way to break down barriers is to employ members of the targeted community as law enforcement personnel. . . . [T]he presence in the ranks of law enforcement of individuals from targeted communities can open pathways of communication and

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216. See David Cole, *Enemy Aliens*, 54 STAN. L. REV., 953, 986 (2002) (“If all one needs to prove is association, one need not do the difficult work of determining whether in fact the individuals are engaged in any criminal or terrorist activity.”).

217. COUNCIL ON SEC. & COUNTERINTELLIGENCE, *supra* note 29, at 9.

218. An international legitimacy argument can be made as well. In a conventional war, the road to victory is paved by “kill[ing] or captur[ing] the enemy.” Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1747 (2009). In the war on terror, this “kill-capture” strategy is subordinated to a “win-the-population” strategy, which aims to win the hearts and minds of targeted populations and marginalize those who seek to destabilize legitimate political orders. See *id.* at 1765–70 (discussing the shift in the United States’ war on terror strategy from the “kill-capture” model to the “win-the-population” model). The domestic miscarriage of justice against those from critical communities can arguably tarnish the United States’ image as a preserver of human rights norms and the rule of law, handicapping the country’s ability to attract support from relevant international populations. See Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 24 (2002) (noting that the United States’ “soft power,” or the ability to positively influence the behavior of other countries through the force of its values, is “derived from the appeal of ideas such as democracy, the rule of law, human rights, and individual freedom”). A similar phenomenon occurred in the early years of the Cold War. Then, the United States’ efforts to win hearts and minds in Asia, Africa, and South America met with stiff resistance as the Soviet Union tarnished the United States’ reputation by circulating court cases illustrating Jim Crow justice. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 12 (2000).

trust, as well as help law enforcement understand those communities' needs and problems.<sup>219</sup>

Just as the presence of individuals from targeted communities can foster trust, however, their absence or mistreatment can breed resentment.<sup>220</sup> Consider the case of Moniem El-Ganayni, a naturalized citizen from Egypt, prison imam and Muslim community leader, and former nuclear scientist for the U.S. Department of Energy.<sup>221</sup> The Middle Eastern and Muslim communities in Pittsburgh, where El-Ganayni lived, probably respected the government for having El-Ganayni work for it.<sup>222</sup> There must have been shockwaves throughout the same communities<sup>223</sup> when federal agents questioned his allegiance, summarily revoked his security clearance, terminated him, and denied him the right to even an agency appeal.<sup>224</sup> "I will not live in this country as a second-class citizen," he said after being denied an agency appeal.<sup>225</sup> The image of El-Ganayni and his wife losing the case in district court and

219. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 191 (2003).

220. See Cole, *supra* note 216, at 986–87 ("If the community . . . view[s] law enforcement officials as unjustly suspecting them for their ethnic, political, or religious identity, an adversarial relationship is likely to arise making law enforcement more difficult. . . . Witnesses are less likely to come forward, to work with police and prosecutors, or to testify in court.").

221. See Sally Kalson, *Physicist Loses U.S. Clearance, Job and Right to Fight Back*, PITTSBURGH POST-GAZETTE, June 1, 2008, at A1 (narrating El-Ganayni's story).

222. El-Ganayni, after all, helped found the local Islamic Center and served as its "president, board member, committee chairman, teacher, prayer leader, prison outreach worker and relief-provider for people in need." Sally Kalson, *Another Imam in Legal Limbo: Physicist/Cleric Fights to Get Back Job, Clearance*, PITTSBURGH POST-GAZETTE, Feb. 3, 2008, at A1. Thus, it is reasonable to believe that members of the local Muslim community held the government in higher regard for employing one of its most visible leaders.

223. See *id.* Farooq Hussein, director of interfaith relations at the Islamic Center, called government confrontations with El-Ganayni and another local imam "astonishing," adding that "[t]hese are good men, very kind, very loyal. . . . If this can happen to them, it can happen to anybody." *Id.*

224. See *El-Ganayni v. U.S. Dep't of Energy*, No. 2:08-cv-881, 2008 U.S. Dist. LEXIS 88243, at \*2–9 (W.D. Pa., Oct. 31, 2008) (describing the facts surrounding the case). The Department of Energy denied El-Ganayni an agency appeal pursuant to Executive Order 12,968 § 5.2(d). See *El-Ganayni v. U.S. Dep't of Energy*, No. 2:08-cv-881, 2008 U.S. Dist. LEXIS 96220, at \*2–3 (W.D. Pa. Nov. 25, 2008) (discussing the Department of Energy's determination that the agency appeal process would not be made available to El-Ganayni). Executive Order 12,698 § 5.2(d) provides that a "particular procedure" related to the agency appeals process can be denied when the head of an agency or principal deputy personally certifies that allowing the procedure would "damage[] the national security interests of the United States by revealing classified information." Exec. Order No. 12,968, 3 C.F.R. 391 (1995), *reprinted in* 50 U.S.C. § 435 (2006).

225. Kalson, *supra* note 221.

moving from Pittsburgh to Egypt after twenty-eight years in the United States likely will not fade easily.<sup>226</sup>

#### IV. REMEDIES

The foregoing Parts have stressed the importance of preserving judicial review of security clearance determinations to vindicate constitutional injuries and provide the government with a diverse workforce capable of winning the war on terror. These concerns demand that courts discard their reliance on super-strong deference to the executive in foreign affairs, which denies a forum to plaintiffs raising constitutional claims of discrimination in relation to security clearance denials and revocations. Section A maps out how lower courts can, consistent with existing Supreme Court precedent, reopen independent judicial review of the merits of security clearance determinations to adjudicate a plaintiff's equal protection constitutional claims. Section B suggests ways in which courts can then make these plaintiffs whole and deter future discriminatory agency rulings while avoiding a chilling effect on agency adjudicators.

##### A. *A Roadmap for Courts of Appeals to Adjudicate the Merits of Security Clearance Determinations*

To escape the current trap of forum foreclosure, circuit courts can draw on the constitutional avoidance doctrine embedded in *Webster*.<sup>227</sup> Indeed, lower courts in other contexts have relied on *Webster* to reopen judicial review and the option for *Bivens* claims when all other options have been foreclosed.<sup>228</sup> Circuit courts would be on especially solid ground doing so here because *Webster* expressly permitted courts to reach the merits of security clearance determinations in relation to sexual orientation discrimination

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226. See Sally Kalson, *Muslim Physicist Leaves U.S. After Losing Security Clearance*, PITTSBURGH POST-GAZETTE, Nov. 28, 2008, at A1 (describing El-Ganayni's departure and noting that he was "a respected member of the Muslim community, a founder of the Islamic Center of Pittsburgh who gave charity freely and moonlighted as a prison chaplain").

227. See *Webster v. Doe*, 486 U.S. 592, 603 (1988) (invoking the constitutional avoidance canon to permit district courts to adjudicate a plaintiff's constitutional claim arising from an adverse security clearance determination). For a description of the application of the constitutional avoidance canon when courts have seemingly been stripped of jurisdiction to review violations of individuals' fundamental constitutional rights, see *supra* notes 68–76.

228. See *supra* note 107.

claims.<sup>229</sup> It would be supremely puzzling for the Court to sanction such review in the case of homosexuals, but deny it in the case of racial minorities and other groups singled out by Congress for heightened protection. To reopen judicial review here, lower courts can find that Title VII does not preempt equal protection claims because of the serious constitutional doubts that would be raised by denying plaintiffs judicial review for colorable constitutional claims.<sup>230</sup>

Once the merits are reached, a court would need to conduct an appropriate equal protection analysis to determine if the plaintiff is entitled to relief. Racial and national origin classifications trigger strict scrutiny review.<sup>231</sup> If evidence can be presented that the administrative adjudicators employed facially discriminatory rules, such as in the DOHA decisions, then the government would need to demonstrate that the discrimination was for a compelling purpose and that the least discriminatory means were employed to achieve the purpose.<sup>232</sup> Courts would likely find such rules as the irrebuttable presumption of proving that a foreign relative will never be coerced by a foreign government to be vastly overinclusive and therefore unconstitutional under a strict scrutiny analysis.

If the lower courts do not want to altogether discard deference doctrines on matters touching foreign affairs, they can invoke an important distinction drawn in *Hampton v. Wong*.<sup>233</sup> There, the Court distinguished between express mandates made in the foreign affairs arena by the president or Congress and those made by administrative agencies.<sup>234</sup> The former receive only rational basis review, whereas the latter receive strict scrutiny.<sup>235</sup> In *Hampton*, per this standard, the Court invalidated a Civil Service Commission internal regulation that required most civil service jobs to be filled by citizens, even though

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229. See *Webster*, 486 U.S. at 603 (“Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director [of the CIA] pursuant to that section . . .”).

230. For a description of how construction of Title VII contributes to forum foreclosure for plaintiffs alleging racial discrimination in the security clearance process, see *supra* Part II.B.

231. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283–84 (1986) (plurality opinion) (invalidating a school board’s program permitting preferential treatment for blacks against layoffs).

232. See *id.* at 280–82 (laying out this rule governing contemporary equal protection jurisprudence).

233. *Hampton v. Wong*, 426 U.S. 88 (1976).

234. See *id.* at 105 (observing that presidential or congressional enactments are entitled to a presumption of validity that executive agencies do not receive).

235. *Id.*

the agency invoked foreign affairs interests such as providing an incentive for aliens to naturalize.<sup>236</sup> Had the law been made through executive order or statute, however, it would have been considered constitutional.<sup>237</sup>

Although tracking *Hampton* would be less than ideal from the theoretical perspective of a court whose imperative is to safeguard individual rights from political branch abuse, it nevertheless would likely lead to the same outcome as a blanket strict scrutiny rule. After all, it would trigger strict scrutiny of the agency regulation, which accordingly would be declared unconstitutional. Once so declared, it would seem highly unlikely for the political branches to expressly require that adjudicators employ the discriminatory standards, such as those pervading DOHA decisions.

*B. Making Plaintiffs Whole, Deterring Future Discrimination, and Avoiding a Chilling Effect*

After declaring the discriminatory rule unconstitutional, lower courts would have to determine the remedy necessary to make the plaintiff before them whole. Professor Walter Dellinger provided a useful distinction between using the Constitution as a “shield” and as a “sword” to fashion remedies for constitutional violations.<sup>238</sup> To use it as a shield is to block the government from causing injury, using equitable or injunctive relief to neutralize impermissible government behavior.<sup>239</sup> To use it as a sword, which the Court explicitly did for the first time in *Bivens*, is to employ it for an affirmative purpose, finding a cause of action directly under the Constitution.<sup>240</sup> Working within the current web of Supreme Court precedent, lower courts can and should feel free to employ both remedies when confronted with colorable equal protection claims arising out of an adverse security clearance determination.

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236. See *id.* at 116 (“[A]ssuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination . . .”).

237. See *id.* at 105 (“We may assume with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized . . .”).

238. Dellinger, *supra* note 20, at 1532.

239. See *id.* (describing his theory of the use of the Constitution as a shield against government action).

240. See *id.* at 1532–33 (describing his theory of the use of the Constitution as a sword in *Bivens*).

In most instances, a shield remedy of remanding the case back to the agency with instructions to apply nondiscriminatory standards would suffice. It is possible to envision, however, an instance when an equitable remedy would be insufficient. Say, for example, that a Kurdish linguist translating intelligence from Northern Iraq had her security clearance revoked in February 2009 solely because of her national origin and is then terminated. In the time between her termination and trial two years later, a phased withdrawal from Iraq commenced and intelligence operations in Northern Iraq were scaled back, so that her old position no longer exists. As a result, a shield remedy would not suffice for the Kurdish linguist because there is no position for the agency to return her to. Instead, it would be “damages or nothing” as it was for the plaintiff in *Bivens*.<sup>241</sup> The case would be analogous to *Davis v. Passman*,<sup>242</sup> in which the Court held that damages were available as a remedy to a congressman’s female employee because in the time between commencing her employment discrimination claim and receiving a ruling, the Congressman lost his seat and therefore she could not be reinstated to her old position.<sup>243</sup>

Under a *Bivens* action, the federal officers responsible for the constitutional violation are held personally liable for causing injury.<sup>244</sup> In this case, then, the adjudicators revoking her clearance would be held liable. Generally, however, executive officials are entitled to qualified immunity and protected from liability for civil damages when performing discretionary functions.<sup>245</sup> Thus, it would be exceedingly difficult to recover from the federal officers here. Moreover, there is the possibility that forcing the agency adjudicators to personally pay could produce a chilling effect in which they avoid issuing adverse security clearance determinations out of fear of losing their salary.<sup>246</sup> Alternatively, then, the plaintiff could take the cause of action arising directly under the Constitution and pair it with a

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241. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (inferring a damages remedy directly under the Constitution because for the plaintiff “it [was] damages or nothing”).

242. *Davis v. Passman*, 442 U.S. 228 (1979).

243. See *id.* at 245, 248 (holding that a *Bivens*-based damages remedy would be available to the plaintiff and remanding for consideration on the merits).

244. See *Bivens*, 403 U.S. at 397 (determining that the defendants could be held personally liable).

245. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (“Qualified immunity ‘represents the norm’ for executive officers . . .” (quoting *Malley v. Briggs*, 475 U.S. 335, 340 (1986))).

246. See *Dellinger*, *supra* note 20, at 1533 (noting the possibility that *Bivens* might induce a chilling effect).

statutory back-pay remedy.<sup>247</sup> The cause of action would track *Bivens*, but the remedy, rather than coming from the pockets of adjudicators, would come from the federal government vis-à-vis the Back Pay Act, which ensures recompense for “unjustified or unwarranted personnel action [that] has resulted in the withdrawal or reduction of all or part of the pay.”<sup>248</sup> This approach would overcome qualified immunity defenses and avoid punishing adjudicators financially, which could potentially have a chilling effect.

Reopening a *Bivens* cause of action could also reshape agency norms. By making pronouncements on the rule of law and especially the Constitution, the judiciary wields influence through social norms. As Professor Richard Primus has said, “[J]udicial articulation of a system of constitutional values in which racial discrimination is reprehensible might shape the normative atmosphere in which government officials act, making them less likely to want to discriminate in the first place.”<sup>249</sup> Thus, the prospect of censure by Article III judges could compel agency adjudicators to examine the motives underlying their determinations, to recalibrate those motives to accord with the Constitution, and to provide candidates from critical communities with fairer hearings.<sup>250</sup> Even if individual adjudicators’ attitudes fail to change, judicial pronouncement of constitutional values could alert an adjudicator’s coworkers and superiors that a fundamental change in culture is needed, fostering agency attitudes and norms likely to serve as a deterrent for discriminatory actions.

### CONCLUSION

Writing in the wake of *Bivens* nearly forty years ago, Professor Walter Dellinger praised the way that the Court had finally used the Constitution as a sword, piercing sovereign immunity to fashion

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247. See U.S. Dep’t of Justice Working Group, *Judicial Review of Claims of Discrimination in Security Clearance Determinations* n.12 (unpublished paper), available at <http://www.fas.org/sgp/othergov/justice.html#12> (describing the position of the Civil Rights Division that this pairing is perfectly plausible).

248. Back Pay Act, 5 U.S.C. § 5596(b)(1) (2006).

249. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1016 (2004).

250. See *id.* at 1016 n.159 (referring to the theory that individuals internalize behavioral incentives that are provided by the law).



appropriate remedies for the violation of individual rights.<sup>251</sup> In the intervening years, the judiciary has all too often retreated, abdicating its duty to safeguard civil liberties, particularly when the executive branch invokes national security and expects due deference.<sup>252</sup> In the context of security clearances, *Egan*'s declaration of super-strong deference to the executive in foreign affairs compelled lower courts to deny plaintiffs a forum for bringing constitutional claims related to racial discrimination in the security clearance process. This abdication has reinforced, rather than checked, executive agency incompetence. As a consequence, the judiciary has enabled a systematic denial of clearances to candidates with foreign connections, depriving the United States of the operational proficiency and the legitimacy to wage a successful war on terror. This Note has presented a roadmap for lower courts to change course by reopening judicial review of the merits of security clearance determinations, making injured plaintiffs whole, deterring future racial discrimination, and avoiding a chilling effect on agency adjudicators.

In short, to reclaim its role in the United States' system of separation of powers, the judiciary should not use the Constitution to make peace with the political branches of government, but rather, should wield it as a sword.

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251. See Dellinger, *supra* note 20, at 1534 (“[T]here is much to be said for a judicial prerogative to fashion remedies that give flesh to the word and fulfillment to the promise those norms embody.”).

252. See Peter Margulies, *The Wages of Playing for Time: Avoidance Doctrines and Interpretive Method in National Security and Foreign Relations Cases* 8 (Roger Williams Univ. Sch. of Law, Research Paper No. 79, 2009), available at <http://ssrn.com/abstract=1465036> (listing foreign affairs cases in which the Roberts Court has issued highly deferential rulings).